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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON STATE AUTO DEALERS  
INSURANCE TRUST,

Plaintiff,

v.

AON CONSULTING, INC.,

Defendant/Third-Party  
Plaintiff,

v.

LUMENOS, INC.,

Third-Party Defendant.

Case No. C07-1182 MJP

ORDER ON AON  
CONSULTING INC.'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

This matter comes before the Court on Defendant Aon Consulting Inc.'s ("Aon") motion for partial summary judgment. (Dkt. No. 52.) After reviewing the motion, Plaintiff's response (Dkt. No. 56), Defendant's reply (Dkt. No. 62) and all documents submitted in support thereof, and after having heard oral argument from the parties, the Court GRANTS the motion in part and DENIES the motion in part. Plaintiff's tort claims for breach of fiduciary duty and professional negligence are hereby dismissed.

**Background**

Washington State Auto Dealers Insurance Trust ("WSADIT") is a self-insured health

1 benefits plan that provides health benefits for thousands of Washington residents. WSADIT  
2 contracts for excess loss insurance to cover any particularly large health claims. In 2003,  
3 WSADIT hired Aon to provide consultation services related to procuring excess loss insurance  
4 coverage. (Pl.’s Resp., Ex. A.)

5 In April 2006, Aon managed the transfer of WSADIT’s excess loss coverage from the  
6 previous stop loss provider to American International Group, Inc. (“AIG”) and worked with  
7 WSADIT’s then third-party administrator (“TPA”), Lumenos, Inc., to provide AIG with required  
8 pre-policy underwriting disclosures. (Pl.’s Resp., Westlund Decl. at ¶ 4; see Pl.’s Resp., Ex. D at  
9 41-42.) Specifically, AIG required disclosure of certain “high risk” claimants on the Excess  
10 Loss Disclosure Statement. (Pl.’s Resp., Ex. G at 4.) Failure to disclose such individuals would  
11 preclude stop loss coverage for those individuals’ claims. (Id.)

12 WSADIT’s Excess Loss Disclosure Statement failed to list one “high risk” claimant who  
13 had incurred over \$523,000 in eligible claims in 2005. (Compl. ¶ 26.) In August 2006, AIG  
14 rejected a claim made on behalf of that claimant because the claimant had not been identified on  
15 the disclosure statement. (Pl.’s Resp., Ex. H at 4.; Compl. ¶ 26.) Aon’s formal appeal was  
16 denied in October 2006. (Pl.’s Resp., Ex. G at 1.)

17 WSADIT alleges that Aon was responsible for providing AIG with the information about  
18 this high-risk claimant during the underwriting process. (Compl. ¶ 10.) WSADIT alleges that  
19 Aon’s failure to report this claimant caused WSADIT to suffer a loss of over \$330,000. (Pl.’s  
20 Resp. at 6.)

21 WSADIT filed suit against Aon for professional negligence, breach of fiduciary duty, and  
22 breach of contract. Washington law governs WSADIT’s tort claims, and Illinois law governs the  
23 contract claim.

## 24 Analysis

### 25 1. The Economic Loss Doctrine

26 Aon argues that Plaintiff’s tort claims for breach of fiduciary duty and professional  
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1 negligence should be dismissed because the economic loss doctrine precludes any tort-based  
2 recovery in this action. Washington’s economic loss doctrine “prohibits plaintiffs from  
3 recovering in tort economic losses to which their entitlement flows only from contract because  
4 tort law is not intended to compensate parties for losses suffered as a result of a breach of duties  
5 assumed only by agreement.” Alejandro v. Bull, 159 Wn.2d 674, 682 (2007). If the doctrine  
6 applies, “the party will be held to contract remedies, regardless of how the plaintiff characterizes  
7 the claims.” Id.

8         The Washington Supreme Court has held that application of the doctrine should begin  
9 with a determination of the type of losses, distinguishing economic losses from personal injury  
10 or injury to property. Id. at 684. “If the claimed loss is an economic loss, and no exception  
11 applies to the economic loss rule, then the parties will be limited to contractual remedies.” Id.  
12 The financial loss at issue in this case is purely economic, as there is no personal injury or injury  
13 to property. Yet Plaintiff argues that its tort claims fall within an exception to the economic loss  
14 rule because they stem from a fiduciary responsibility between the parties. See SMI Owen Steel  
15 Co. v. Marsh USA, Inc., 520 F.3d 432, 443 (5th Cir. 2008) (applying Nevada law, court held that  
16 the economic loss doctrine does not bar recovery for negligence actions involving breach of a  
17 professional, extra-contractual duty imposed by law).

18         Although Washington courts have not squarely addressed the issue, Plaintiff makes the  
19 argument that the analysis establishing the exception in other states would be consistent with this  
20 state’s precedent. Citing Illinois law, Plaintiff argues that the relationship between a  
21 professional, such as an attorney or an insurance broker, and her client can give rise to an extra-  
22 contractual duty, the breach of which would sound in tort. See Congregation of the Passion v.  
23 Touche Ross & Co., 636 N.E.2d 503, 513-515 (Ill. 1994); First Midwest Bank v. Stewart Title  
24 Guar. Co., 843 N.E.2d 327, 333-335 (Ill. 2006); Kanter v. Deitelbaum, 648 N.E.2d 1137, 1139-  
25 40 (Ill. App. 1995). The Illinois Supreme Court has found that the professional sector offers  
26 intangible goods such as advice and expertise, which “cannot be memorialized in contract terms”  
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1 but are “expected independent of the [professional’s] contractual obligations.” Congregation of  
2 the Passion, 636 N.E.2d at 513. The court makes a distinction between the commercial sector,  
3 which deals in tangible goods, and the professional sector, which deals in intangibles. When a  
4 client relies on a professional to make decisions based on that professional’s knowledge and  
5 judgment, a duty arises between the two parties that is outside the parties’ contract and imposed  
6 by law. When that duty is breached, the client’s tort claim (often brought in the form of a  
7 malpractice action) is distinct from any breach of contract claim and is not precluded by the  
8 economic loss doctrine.

9       Whether the Washington courts would adopt such an exception is irrelevant in this  
10 matter, because Plaintiff’s allegations do not fall within the category of actions described by the  
11 caselaw it relies on to establish the exception. WSADIT contracted with Aon to procure excess  
12 loss insurance coverage. While Aon likely acted as a professional advisor in recommending a  
13 particular carrier to its client, WSADIT’s allegations do not concern Aon’s exercise of  
14 professional judgment or expertise. Instead, WSADIT alleges that Aon failed to perform its  
15 contractual duties when it did not gather information required by AIG to procure coverage. Aon  
16 was not required to exercise professional judgment to determine what data to gather and submit  
17 to AIG. AIG required disclosure of certain categories of information, and Aon allegedly failed  
18 to gather and submit the requested information. Because Aon’s obligation to submit the proper  
19 information and procure stop loss coverage was a duty assumed by contract, Aon’s motion for  
20 partial summary judgment regarding breach of fiduciary duty and professional negligence is  
21 granted and those claims are dismissed.

## 22       2. Damages Limitation Clause

23       Having found Plaintiff’s tort claims invalid, this Court need only determine whether the  
24 damages limitation clause applies to any contractual damages. The clause states, “nothing herein  
25 will obligate [Aon] to pay any consequential or punitive damages or any damages whatsoever in  
26 excess of the fees paid pursuant to this contract[.]” (General Terms Contract at C-2, under  
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1 Indemnification.) Aon argues that this clause limits recovery to \$48,000 – the fees paid for the  
2 contract period of one year. WSADIT argues that the contract was not a single year agreement  
3 because the engagement letter contained a renewal clause stating that the agreement “is effective  
4 upon signature and continues in effect until your annual plan renewal in May 1, 2006” and “[a]t  
5 this time, the agreement will automatically renew for you.” (See Pl.’s Resp., Ex. B at 2.)

6 Both parties agree that the contract’s choice of law provision requires application of  
7 Illinois law. No Illinois authority states whether a renewal or evergreen clause extends the  
8 contract term for an existing contract, but WSADIT cites to other jurisdictions holding that “[a]n  
9 evergreen clause provides for the continuation of the contract after the primary term[.]” Wyo.  
10 Consumer Group v. Public Serv. Comm’n of Wyo., 882 P.2d 858, 861 fn.1 (Wyo. 1994); (Pl.’s  
11 resp at 23).

12 Because the renewal clause does not specify the length of the contract, this Court finds it  
13 ambiguous. Plaintiff makes a convincing argument the phrase providing for contract renewal  
14 could be interpreted to mean either the start of a new contract or a continuation of the former  
15 contract. (Pl.’s resp. at at 23.) Because Aon drafted the contract and failed to include clear and  
16 unambiguous language limiting its damages, the Court must construe the contract language in  
17 Plaintiff’s favor and deny Aon’s motion for summary judgment on the limitations clause. See  
18 Scott & Fetzer Co. v. Montgomery Ward & Co., 493 N.E.2d 1022, 1029-30 (Ill. 1986).

### 19 3. Exculpatory Clause

20 Aon asserts that the exculpatory clause in the parties’ contract relieves it of liability if  
21 WSADIT’s loss resulted from inaccurate or incomplete disclosure of data on WSADIT’s part.  
22 (Def.’s Mot. at 17.) In order to reach this issue, the Court would be required to assume away a  
23 number of factual variables. The Court must assume that Aon fulfilled all of its duties to  
24 WSADIT when it attempted to collect from Lumenos the disclosure information required by  
25 AIG underwriters. (Def.’s Reply at 2.) The Court must also disregard WSADIT’s claims that it  
26 bore no responsibility for the lack of disclosure to AIG and that Aon failed to request and collect  
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1 the information from WSADIT or Lumenos and disclose “high risk” claimants to AIG. (Pl.  
2 Resp. at 6; Pl.’s Compl. ¶ 10.) Finally, the Court would also need to assume that Lumenos, if  
3 found to be at fault, was acting as WSADIT’s agent.

4 Even if WSADIT and/or Lumenos erred in failing to provide the data, the trier-of-fact  
5 must also determine whether Aon was responsible for initially requesting the information.  
6 Because the Court is not prepared to make a legal ruling that is contingent upon an unknown or  
7 predicted set of factual findings, Aon’s request for partial summary judgment on this issue is  
8 denied.

### 9 **Conclusion**

10 Because Plaintiff’s allegations are contractual in nature, the Court hereby GRANTS  
11 Aon’s motion for partial summary judgment regarding the economic loss doctrine and  
12 DISMISSES the tort claims for breach of fiduciary duty and professional negligence. The Court  
13 finds the renewal term in the contract ambiguous and DENIES Aon’s motion for partial  
14 summary judgment regarding the damages limitation clause. Finally, because issues of material  
15 fact are in dispute, the Court also DENIES the motion for partial summary judgment on the issue  
16 of the contract’s exculpatory provision.

17 The Clerk is directed to send a copy of this order to all counsel of record.

18 Dated: September 24, 2008

19 /s/ Marsha J. Pechman  
20 Marsha J. Pechman  
21 U.S. District Judge  
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